Award No. 3193

Docket No. CL-3116

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE UNION TERMINAL RAILWAY COMPANY

ST. JOSEPH BELT RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Union Terminal Railway and St. Joseph Belt Railway Company, that the Carrier violated the Clerks' Agreement:

1. When, on February 9, 10, 20, 21, 22 and March 7, 1945, it removed the clerical work and duties of certain Yard Clerk positions listed below, out from under the scope and operation of the Agreement as follows:

Date	Regularly Assigned Occupant	Rate	Assigned Hours
Feb. 9 & 10	E. A. Burrell	$6.86	3 PM to 7 PM; 8 PM to 12 PM
Feb. 20, 21 & 22	W. L. Stigers	7.40	9 AM to 2 PM; 3 PM to 6 PM
March 7	W. L. Stigers	7.40	9 AM to 2 PM; 3 PM to 6 PM

and utilized the occupant of an "excepted" position, namely, Walter Pankiewicz, who holds no seniority rights under the Clerks' Agreement entitling him to perform said work and failed and refused and continued to refuse to permit clerks listed on the roster and occupying positions subject to all Agreement provisions to perform same;

2. (a) That Yard Clerk F. P. Doolan, rate 7.40 per day, who ended his regular eight (8) hour tour of duty at 3 PM, and who was available, ready and willing to work, will be paid eight (8) hours at time and one-half rate or $10.29 for each day, February 9th and 10th, amount $20.58, and

(b) That Yard Clerk F. J. Connaghan, rate $7.02 per day, who ended his regular tour of duty at 7:59 AM and who was available, ready and willing to work, will be paid eight (8) hours at time and one-half rate, or $11.10 for each of the dates, February 20, 21, 22 and March 7, amount $44.40 for wage loss suffered because of the Carrier's violation of the Agreement.

EMPLOYES' STATEMENT OF FACTS: The clerical force on the Union Terminal Railway and St. Joseph Belt Railway Companies, subject to the scope and operation of the Clerks' Agreement and their positions to which

11:30 A.M. to 3:00 P.M. on his own job, and then on the job of E. A. Burrell from 3:00 P.M. to 7:00 P.M., and 8:00P.M. to 12:00 midnight, with the same hours on February 10. This would have afforded Mr. Doolan a maximum of six continuous hours, exclusive of two meal periods on each of the two dates, for continuous rest, from 6:00 A.M., February 9, to 12:00 midnight, February 10, or a maximum of six continuos hours for rest within a period of 42 hours.

The service required of claimant F. J. Connaghan would have been from 11:59 P.M., February 19, to 7:59 A.M., February 20, on his own job, and then from 9:00 A.M. to 2:00 P.M., and 3:00 P.M. to 6:00 P.M. on the assignment of W. L. Stigers, returning to his own job at 11:59 P.M. on February 20, and working the same hours to 6:00 P.M. on February 21, and also the same hours up to 6:00 P.M. on February 22, thus affording him a maximum of 5′59″ continuous rest period between 11:59 P.M., February 19, and 6:00 P.M., February 22. If Mr. Connaghan returned to his regular assignment of 11:59 P.M. on February 22 and worked to 7:59 A.M. on February 23, as claimed by the employes, he would have at no time had a continuous rest period in excess of 5′59″ within a total elapsed time of 80′00″.

The service required of Mr. Connaghan on March 7, as claimed, would have been from 11:59 P.M., March 6, to 7:59 A.M., March 7, on his own job, and from 9:00 A.M. to 2:00 P.M., and 3:00 P.M. to 6:00 P.M. on the assignment of W. L. Stigers. If Mr. Connaghan had been worked as outlined and had returned to his regular assignment at 11:59 P.M., the 7th, he would have had a maximum of 5′59″ continuous rest period in the 24-hour period from 11:59 P.M., March 6, to 11:59 P.M., March 7.

The Carrier has maintained that the rules of the working agreement which establish the contract obligations of the Carrier to its employes, should be subjected to sound and practical interpretations and applications in the interests of efficiency and the welfare of the individuals covered by such an agreement. We do not believe that the working agreement in question comprehends that employes should be subjected to work as outlined above, when it may reasonably be avoided.

The Carrier also believes that the overtime, call and related penalty rules in the working agreement are basically designed to prevent the Carrier working its employes excessive hours or outside of their hours of assignment under certain circumstances without payment at the punitive rate. Such a rate was established to prevent the Carrier from indulging in such a practice, and we, therefore, believe that when the regularly assigned employes perform a full eight (8) hours of service and a sudden vacancy because of illness or death in the immediate family arises, and there is no extra furloughed clerk available, the Carrier is not only justified in filling such a vacancy with any qualified person available, but is curing the very evil which the penalty rules were designed to prevent. We believe that the interpretation and application sought by the organization in this dispute, which would permit the penalty rules to rest upon greed and avarice, would disregard the humane aspects of the working agreement and the health, safety and welfare of the individual employes covered thereby.

Because of the foregoing the Carrier respectfully submits that your Board should deny the complaint and claim of the organization in this dispute.

OPINION OF BOARD: The sole question raised by this case is whether the Carrier may properly use the occupant of an excepted position to perform the work of regularly assigned employes under the Clerks' Agreement who are absent from work rather than call regularly assigned employes for overtime work and, if not, the correct punitive rate to be allowed those deprived of the work.

The Carrier contends that as Claimants had worked a full eight hour assignment, and there being no extra or furloughed men available, that it was not required to give the work to employes under the Agreement. By many awards this Division has held that the work covered by the Agreement belongs to the employes for whom the Agreement was made. Awards 2341, 2386 and

2426. Clearly, therefore, Claimants were entitled to the work as against one excepted from the Agreement.

The question then arises as to the penalty to which the Carrier subjected itself by giving the work to one outside the Agreement. The Organization claims the time and one-half rate of the position. The Carrier claims, in case a violation is found, that the pro rata rate controls. The Organization bases its claim on the fact that if Claimants had performed the work, it would have been paid for at the overtime rate of time and one-half. It seems to us that the Agreement contemplates a different penalty rate for work lost and work performed falling within a penalty provision of the Agreement. It seems clear that the penalty rate for work lost because it was improperly given to one not entitled to it under this Agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work. That is the rate the regularly assigned employe would receive if he were deprived of it. We fail to find any contract provision, or any reason in adition thereto, that would give any other employe a greater penalty rate than the employe to whom the work was assigned in the event he was deprived of it. In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned. The overtime rule itself is consonant with this theory when it provides that "time in excess of eight (8) hours exclusive of the meal period on any day will be considered overtime." The overtime rule clearly means that work performed in excess of eight hours will be considered overtime. Consequently, time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides. This conclusion is supported by this Division Awards 2346, 2695, 2823 and 3049.

The Carrier urges that our holding that regularly assigned employes must be called to work at overtime rates where there are no extra or furloughed men available, could, if carried to the extreme, deprive employes of sufficient rest or even compel their working 24 hours per day. While a state of facts bordering on the absurd can be conceived under most any rule, in most instances they are highly speculative and deserve no treatment until such a state of facts is actually before us. The Carrier can usually avoid such contingencies by a judicious assignment of employes under the Agreement to overtime work. If conditions become so emergent as the Carrier suggests, an understanding with the Organization can usually be obtained. If the Organization should, under such circumstances, became arbitrary and capricious in its action, we doubt not that this Board would adequately protect management if it pursued a reasonable and necessary course.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the current Agreement was violated.

AWARD

Claim (1) sustained. Claims 2 (a) and 2 (b) sustained at the rate regularly assigned to the employe charged with the performance of the work under the current Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of May, 1946.